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IN THE

Supreme Court of the United States

October Term, 1949

No. ....

IN THE MATTER OF FEDERAL WATER AND GAS CORPORATION, ET AL.

CHENERY CORPORATION, ET AL., *Petitioners*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari be issued to review a judgment of the United States District Court for the District of Delaware before rendition of judgment by the United States Court of Appeals for the Third Circuit, to which court petitioners have appealed the judgment of the District Court. That judgment approved and enforced an order of the Securities and Exchange Commission entered on July 27, 1948 pursuant to the provisions of the Public Utility Holding Company Act of 1935.

OPINIONS BELOW

The Court of Appeals has not rendered an opinion. The opinion of the District Court is reported at 87 F. Supp. 289. The opinion and findings of the District Court appear at R. 52-68.* The order of the Commission (R. 34), which was enforced by the District Court, is reported as Holding Company Act Release No. 8387.**

JURISDICTION

The order of the District Court was entered January 11, 1950. Notice of Appeal to the Court of Appeals was filed by the petitioners on February 8, 1950 (R. 69). The jurisdiction of this Court is invoked under § 1 of the Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1), which authorizes review by writ of certiorari of any case in the Court of Appeals before rendition of judgment or decree.

QUESTION PRESENTED

Whether this Court's decision in *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194, compels the District Court to find a reorganization plan fair and equitable and enforce it notwithstanding the District Court's stated conclusion, after examination of the plan, that there is no substantial evidence to support the Commission's findings that the plan is fair and equitable to petitioners.

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* The letter "a" which is included as part of the number of each page of the Joint Appendix in accordance with the rules of the Third Circuit has been omitted in all record references in this petition.

** This order supplemented the Findings and Opinion of the Commission entered July 2, 1948, Holding Company Act Release No. 8313 (R. 7).

STATUTES INVOLVED

Sections 11(e) and 18(f) of the Public Utility Holding Act of 1935, 49 Stat. 822 and 832, 15 U. S. C. §§ 79k(e) and 79r(f) provide:

> § 11(e) "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and assets thereof, wherever located; and the court shall have jurisdiction to appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance

with the plan theretofore approved by the court and the Commission, the assets so possessed.

§ 18(f) "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this chapter."

STATEMENT

Federal Water and Gas Corporation (Federal), a holding company registered under the Public Utility Holding Company Act of 1935, submitted a plan to the Commission pursuant to § 11(e) of the Act proposing its own liquidation and dissolution and providing for the satisfaction of all claims against it and distribution of its remaining assets to its stockholders. One provision in Federal's plan dealt with the claims of petitioners against Federal and it is to that provision and the action of the Commission and the District Court with respect to that provision that this petition is confined.

Petitioners hold preferred stock in Federal Water Service Corporation, a company which had previously

merged with Federal and a third company, Utility Operators Company (R. 60). They were denied participation in that merger on a parity with the other preferred shareholders of Federal Water Service Corporation on such shares of their stock as they had purchased during the pendency of various reorganization plans at a time when they were part of the management of one or more of the companies involved in the reorganizations (R. 111). After the merger had been consummated, but while certain of its provisions were still in litigation as described below, Federal, the surviving company, determined to dissolve. Its plan of dissolution provided alternative methods for distributing its assets among its shareholders dependent upon the Commission's determination as to what limitation should be imposed upon the claims of petitioners (R. 73-74).

The Commission set down Federal's plan for hearing and specified as one of the issues: the amount of Federal's assets that should be set aside in satisfaction of the claims of the petitioners in order to effectuate the purposes of § 11(b) of the Act and to make the plan fair and equitable to the persons affected by it (R. 5-6). The petitioners sought leave to intervene to oppose an inequitable limitation of their claims, and were heard (R. 70)* After hearing, the Commission approved Federal's plan of dissolution on condition that it be amended to provide that $313,190 be set aside in full and complete satisfaction of petitioners' claims. The Commission held, first, that the Merger Plan, which both it and this Court had previously considered, constituted a final determination that a cash payment of $313,190 in full satisfaction of petitioners' claims would be fair and equitable (R. 18). The Com-

* Petitioners' application for leave to intervene was subsequently denied (R. 32).

mission went on, however, to consider independently what amount the petitioners might be allowed in the dissolution of Federal, and decided that it would not be fair and equitable to allow them anything in excess of $313,190, the cost of their preferred stock plus interest at 4 percent to October 31, 1941, the effective date of the merger (R. 20-22).

The Commission applied to the District Court of Delaware, pursuant to §§ 11(e) and 18(f) of the Act, to enforce the plan of Federal as amended in accordance with its order. In its application for enforcement the Commission requested, *inter alia,* that the District Court issue an appropriate order enforcing the provisions of the plan as approved by the Commission and enjoining all claimants against Federal, including the petitioners, from taking any action that might tend to interfere with the carrying out of the provisions of the plan (R. 4).

The District Court was clear as to the merits of the plan. It rejected the Commission's independent determination as to its fairness and equity, and stated that it would have

> "no hesitation in holding there is no substantial evidence to support the Commission's finding that Chenery should be penalized and limited to cost plus interest for its preferred stock purchases" (R. 57).*

Nevertheless, the court felt compelled to approve and enforce, as requested by the Commission, a plan which it considered wholly unfair and inequitable to the peti-

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* This unqualified conclusion was reached by the court with full recognition that "After the Engineers case, there is left a small area of reexamination for the § 11 district enforcement court to probe for a 'clear' error of law on the part of the Commission" (R. 57).

tioners. This because it considered that the decision of this Court in *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194, constituted anticipatory approval of what the Commission had done in this case and required the district judge to abdicate as a § 11 enforcement court and rubber stamp Federal's dissolution plan, as requested by the Commission.

Petitioners took an appeal from the judgment of the District Court to the Court of Appeals for the Third Circuit. For reasons that will be set out hereafter, petition for writ of certiorari is being made to this Court prior to consideration of the appeal by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

True, this is the third time that petitioners have been before this Court. But regrettable as protracted litigation is for all concerned there is no other solution. The question presented in this petition is substantial: it involves an important issue in the administration of the Public Utility Holding Company Act: there is broad public interest in ascertaining whether the Commission has an obligation to determine the fairness and equity of each plan presented to it. An even more compelling reason for the Court to grant this petition, however, is that petitioners' property is being taken in reliance upon an interpretation of a prior decision of this Court. Among the highest functions of any court is to decide each case in a way that will clearly and unequivocally settle the matter at issue. Petitioners are the victims of uncertainty as to the scope and effect of this Court's decision in *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194, an uncertainty arising from the Commission's actions de-

scribed below; only this Court can resolve that uncertainty. That the uncertainty is real and substantial is apparent from the unusual expression of the District Judge, long experienced in corporate reorganization matters:

> "I trust this cause in its appellate flight will some place along the line have articulated for the present objectors and the legal literature at large the nuances that have become attached to this particular litigation, in contradistinction to the specificity of decision in comparable or, at least, related matters before the administrative body" (R. 57).

I

Unless this Court reviews and reverses, the Commission will have succeeded in taking petitioners' property in a manner that the District Court has found to be wholly repugnant to established standards of fairness and equity—indeed, in a manner that any fair-minded person, reviewing the whole course of the Commission's actions, can regard only as shocking and unjust. After having been informed by this Court that general equitable principles did not warrant the penalty which the Commission had imposed, the Commission, in a second review, discovered that the Holding Company Act itself—and the Commission's expertise under that Act—required the taking of petitioner's property, and reimposed the same penalty. The Commission, in the review in this Court of its second order, represented that it had evolved, and was enunciating, a rule of general application, and on that basis obtained this Court's approval of its action.

But, this purported rule of general application *was never again invoked.* Claimants situated similarly to petitioners (though with far less equity) were not

penalized. Their property was not taken. Not until *this* proceeding, when petitioners again sought to protest against the denial of their property rights, did the Commission rediscover and reapply the purported rule. Were the Commission's action to be allowed to stand, petitioners would be the victims of a rule under the Holding Company Act which applies to them, and to them alone. Moreover, they will have been penalized very substantially by a rule which as to them was substantially *ex post facto,* while others who acted in defiance of the rule, will have been permitted to escape its application.

This is not a mild indictment of the result of this litigation, nor is it intended to be. It inspired what can only be regarded as an extraordinary opinion from an experienced District Judge, who condemned the result without qualification, but felt powerless to avoid it. A summary recital of the history of the litigation will, we believe, reveal that our indictment and the Judge's condemnation are fully justified.

The Commission first approved a plan for the merger of Federal, Federal Water Service Corporation and Utility Operators Company on condition that petitioners be denied participation on a parity with other preferred shareholders of Federal Water Service Corporation. Although the merger was consummated, petitioners sought review of the order denying them parity, and this Court found that the general equitable precedents invoked by the Commission in support of its action did not justify it in denying petitioners parity with the other preferred shareholders, and remanded the cause to the Commission. *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80. (First *Chenery* case). Thereafter, Federal Water Service Corporation amended the pro-

visions of the merger to allow petitioners to participate on a parity with other preferred shareholders. The Commission then refused to approve the amendment. Upon review, this Court refused to disturb what it called "an allowable judgment" on the part of the Commission, *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194. (Second *Chenery* case).

In the second *Chenery* case the principal issue was whether, in the face of the first *Chenery* case, the Commission could still deny petitioners parity with other preferred shareholders by invoking its inherent statutory powers under the Holding Company Act, and, if so, whether it could do so by order in the absence of a general regulation. A majority of this Court answered both questions in the affirmative. The opinion of the majority makes clear that it was holding that the Commission could discover and announce a new standard of conduct by order in a specific case, and was not limited to general regulations for the announcement of such standards. Thus, the majority described the Commission's error in its first decision;

> "The Commission appeared to have treated the preferred stock acquired by the management in accordance with what it thought were standards theretofore recognized by courts. If it intended to create new standards growing out of its experience in effectuating the legislative policy, it failed to express itself with sufficient clarity and precision to be so understood." (U. S. 194, 198),

then it posed the problem before t. ommission in its second attempt,

> "The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in re-

> lation to the particular proposal before it. The Commission was asked to grant or deny effectiveness to a proposed amendment to Federal's reorganization plan whereby the management would be accorded parity treatment on its holdings. It could do that only in the form of an order, entered after a due consideration of the particular facts in light of the relevant and proper standards. That was true regardless of whether those standards previously had been spelled out in a general rule or regulation." (332 U. S. 194, 201),

and concluded:

> "Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct" (332 U. S. 194, 203).

Though the Commission now shrinks from any suggestion that it was purporting to establish a standard of conduct, or a rule of general application, in its second *Chenery* decision, it is certain that the majority of this Court understood that was what it was approving.

It is equally clear that the Commission not only purported to promulgate a rule of general application but also urged affirmance on that basis. It stated in its opinion:*

> "It is our view that no management of a holding company can engage in a program of buying its company's stock during the course of reorganization under the Act, without raising the probability that in one way or another the personal interests it seeks to further through its program will be opposed to its duties to exercise disinterested judg-

* Holding Company Act Release No. 5584, February 7, 1945 (R. 131).

ment in matters pertaining to subsidiaries' accounting, budgetary and dividend policies, to present publicly an unprejudiced financial picture of the enterprise and to effectuate a fair and feasible plan expeditiously" (R. 162).

* * * * *

"But even where proof of intentional wrongdoing is lacking, should the answer be substantially different? We think not. Where the management embarks upon a stock purchase program during a reorganization, it places its personal interests actively at odds with the interests of other stockholders it represents in the reorganization" (R. 163).

The undisputed fact that there was no double-dealing, fraud, or lack of disclosure on the part of petitioners in making the purchases was disposed of by the Commission in this way:

"Turning now to the case before us the salient fact is, as the interveners have stated, that their primary object in buying the preferred stock of Federal was to obtain the voting power that was accruing to that stock through the reorganization, and to profit from their investment therein. This stock they had purchased in the market at prices that were depressed in relation to what they anticipated would be, and what in fact was, the earning and asset value of its reorganization equivalent. We think we need look no further than this"* (R. 165).

* * * * *

"For obvious reasons we do not conceive it our function to try to guess whether a reorganization manager, faced with a choice of conducting the reorganization for the accomplishment of his own

*The majority of this Court in affirming, emphasized that this was the end of the Commission's inquiry, 332 U. S. 194, 206.

> objectives or for the benefit of security holders generally, is the kind of man who would be likely to take one course and not the other. What we say is that when reorganization managers have undertaken a program of acquiring their company's securities for their own account, in contemplation of or during the reorganization proceedings under their charge, they have placed themselves in a position where they are peculiarly susceptible to temptation to conduct the reorganization for personal gain rather than the public good; the program of making advantageous purchases of stock could have had an important influence—even though subconsciously—upon great numbers of business decisions all along the way" (R. 167).

The District Court below, despite the Commission's protests to the contrary, had no question but that it was a rule of general application that the Commission was laying down in its second *Chenery* decision, saying:

> "The Commission's opinion in the Chenery case seems clearly to indicate that the circumstances of each case are not controlling but that all transactions in securities during reorganization by officers and directors, are prohibited" (R. 56).

Finally, one of the principal substantive arguments in the Commission's brief to this Court was:

> "THE COMMISSION WAS ENTITLED TO FORMULATE THE STANDARD APPLIED IN THIS CASE BY ORDER AND WAS NOT LIMITED TO ACTING BY A GENERAL RULE."

After it had thus persuaded a majority of this Court that the same result that was unsupportable on general equitable principles could be reached by a rule of general application under the Holding Company Act, the Commission promptly forgot about its new rule. By the time Federal's plan—the subject of this petition—

came before the Commission the standard, or rule of general application, which a majority of this Court had approved, had been abandoned. Indeed, it is to be seriously questioned whether any "rule" ever was established.* In no case, so far as the records show, has it ever been applied—except against the petitioners. In three cases, indistinguishable in any material way from the circumstances in which the Commission discovered and applied the rule against the petitioners, the Commission has permitted reorganization managers, who purchased stock during the pendency of a plan, to participate in that plan on a parity with all other holders of the same class of stock. *In the Matter of Cities Service Co.,* October 1, 1947, Holding Company Act Release No. 7720; *In the Matter of American States Utilities Co.,* October 3, 1947, Holding Company Act Release No. 7721; *In the Matter of Middle West Corporation,* December 9, 1947, Holding Company Act Release No. 7905, 76 F. Supp. 63 (1948).** Although in each of these cases the Rule against Chenery was clearly applicable, if in truth there was such a Rule, the Commission held *contra.* It attempted to excuse itself for not following the Rule by considering actual

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* That this accusation is not lightly made is clear from the opinion of the District Court:

> "For example, Chenery successfully shows that the policy of the Commission—to prohibit and penalize purchases of stock by officers and directors during reorganization—was only an avowed policy in that it was never followed by the Commission, except in the instant case; and if such policy ever existed it was clearly abandoned by the Commission six months prior to the time it entered the order now on review in the instant case" (R. 56).

** Because these cases show so conclusively the Commission's abandonment of the rule used to penalize petitioners, the opinions therein are reprinted in full at pages 202, 228 and 254 of the Record, respectively.

harm or degrees of potential harm—considerations totally irrelevant to the Rule as the Commission applied that Rule to Chenery and expounded it to this Court in the second *Chenery* case. If the Rule does embrace these added considerations, then the petitioners' case is actually stronger than any of these three for not applying it. In the light of the Commission's rationalization as to how it had applied the Rule in these cases, the District Court said:

> "I conclude from these cases, and all the available data, that the Commission never did have a policy of penalizing purchases of stock during reorganization regardless of the facts of the particular case.
>
> "If the facts and consequences of a particular case determine whether a penalty should be inflicted, I think it clear that the plan could not be approved as fair and equitable. This case is by far the strongest on the facts against the imposition of the penalty" (R. 56-57).

A further factor that weighs heavily in petitioners' favor, if the Rule is a rule of reason, is that they purchased all of their stock *before* there was any such rule or any suggestion that their might be such a rule, and ceased such purchases when the Commission first suggested that the practice was questionable. In at least one of the other cases in which the Commission succeeded in finding extenuating circumstances the stock purchases were made *after* the Commission had moved to penalize managers who purchased during the pendency of a reorganization, *In the Matter of Cities Service Co., supra.* The Cities Service officers and directors were thus clearly on notice that they might not be given parity treatment. Petitioners had no such notice. Yet petitioners are penalized, while those who

purchased with notice of the Commission's policy or rule have been excused and given parity treatment.

II

The plain facts are that the Commission took a position nine years ago that is clearly erroneous and unfair to petitioners; it has once succeeded in preserving that position by purporting to recast its rationale—to the satisfaction of a majority of this Court; now it has become clear that there never has been any such rationale. Under many circumstances the petitioners' position would be unfortunate, but irretrievable. The unraveling that would be necessary to make them whole would be too much for any court to undertake. But here, because of the Commission's continuing jurisdiction over holding companies, an opportunity is presented to do substantial justice to petitioners without prejudicing the matters decided in the earlier litigation. In these circumstances the administrative system is peculiarly competent, in a way that a court may not be, to avoid perpetuation of an error once made. The Commission should be free—indeed anxious—to use that competence and should not fetter itself to a position once taken.

It would seem both elementary and essential that if a District Court is to approve a particular dissolution plan as fair and equitable and is to enforce that plan on the basis of such approval, it must be free to inquire into the provisions of that plan—at least to determine whether the Commission has committed clear error of law.* But here the Commission has secured enforce-

* The District Court found:

> "If the facts and consequences of a particular case determine whether a penalty should be inflicted, I think it clear that the plan could not be approved as fair and equitable" (R. 57).

ment only because the District Court felt compelled to defer to a decision of this Court rendered more than a year before the Commission considered and approved the plan it is presently asking the court to enforce. It is of little importance whether Federal's dissolution plan be viewed as the same proceeding that has twice been before this Court, or as an entirely new cause. What is of importance is that under either view this Court is in a position to assure the petitioners equality of treatment with all other persons who come before the Commission. Without upsetting what it has already decided in the second *Chenery* case, without in any way doing violence to the principles of *res judicata,* which are urged by the Commission in lieu of fairness and equity, this Court can direct the Commission to reconsider Federal's dissolution proposal and arrive at a plan that will be fair and equitable.

The dissolution of Federal is undeniably a further and additional step in compliance with the Public Utility Holding Company Act of 1935. It does not present any question as to whether petitioners can participate in the merger on a parity with other preferred shareholders. The merger is accomplished. What is at issue in this plan is the amount of money that should be paid petitioners in satisfaction of their claims against Federal, the surviving corporation. There is presented no question of allocating stock in a new corporation, no question of voting rights or control or continuity of management—all of which were the very essence of the merger case. Indeed, Federal's dissolution can be said to have no future effect whatsoever. It is simply a question of distributing its assets. Moreover, due to the success of the corporation since 1941 every shareholder, except petitioners, is assured of payment not only of his contractual rights upon liquida-

tion, but of a substantial surplus. Even when petitioners are treated on a parity, there will be a payment to all stockholders of more than their contractual rights on dissolution.

The plan which the Commission now asks the District Court to approve and enforce limits petitioners' claims against the dissolving corporation in a manner that the District Court considers unfair and inequitable. Nothing that this Court decided in the second *Chenery* case should prevent that Court from remanding the cause to the Commission for development of a plan that will be fair and equitable in accordance with § 11(e) of the Act. The second *Chenery* decision was not a declaratory judgment of petitioners' rights. Nor did it purport to instruct the Commission as to how it should treat the petitioners in all matters that might thereafter come before the Commission under the Act. Its full effect was confined to the Commission's authority to deal with a specific plan of reorganization under the Holding Company Act.

Only recently this Court had occasion to confine the judgment of a federal regulatory agency to the issue expressly decided by the agency, *Regents of the University System of Georgia* v. *Carroll, et al.*, February 6, 1950. There the Communications Commission had refused to renew a broadcasting license unless a contract between the licensee and the Regents was given, in the words of the Commission, "no further effect". This Court held that the Commission's judgment went only so far as was necessary to discharge its licensing function under the statute and did not prevent the Regents from collecting damages for breach of the condemned contract. Similarly, this Court's second *Chenery* decision did no more than approve an allowable judgment rendered by the Commission in dis-

charging its simplification function under the Holding Company Act. The Commission could not have purported to determine the disposition of private rights that might later be exerted against the corporation that survived the merger.

Certainly the Commission should not disregard the experience it has gained since the merger in favor of a perfunctory reiteration of a position taken in that case. One of the principal advantages of the administrative, as contrasted to a purely judicial system, has been thought to be the greater ability of the administrator to keep abreast of and reflect developments in his field of competence. To take refuge, as the Commission must here, in a judgment first reached in a related matter over nine years ago and ignore even its own intervening experience is not the quality of expertise that justifies the administrative system.

The simplification of holding companies pursuant to the Holding Company Act of 1935 has been and continues to be a complex task. Each system, each step in the reorganization and dissolution of the many companies involved, gives rise to conflicting claims and interests. The responsibility for resolving those conflicts is given to the Commission by statute. But it is a continuing case-to-case task, and at each step the Commission, to secure enforcement, must satisfy the District Court that the provisions of each plan are fair and equitable within the meaning of § 11. There is no short cut. There may be similarities in the considerations affecting one plan and those affecting another that the Commission has earlier approved. But even in those circumstances the District Court must be free to disagree with the Commission and reject the plan, within the limitations of the *Engineers* case, of course.*

* *S. E. C.* v. *Central Illinois Corp.*, 338 U. S. 96.

And when the District Court does find a plan unfair, it is wholly inconsistent with the clear statutory purpose for the Commission to retreat, as it did here, to the contention that the District Court is barred from examining the provisions of the plan.

Federal's dissolution plan affords the Commission an opportunity to reexamine petitioners' claims in the light of its own experience without disturbing in any way the merger, which has already been accomplished. Neither on the facts nor on reason does this situation call for the application of the harsh doctrine of *res judicata.* The basis of *res judicata* is expediency, and it very often is necessary to sacrifice justice on the theory that it is more important that disputes be terminated, than that they be terminated equitably. But here there is no reason to compromise with what is fair and equitable. No divestment of interests created by this Court's prior decision is threatened. The merger has been effected. It will not be, and cannot be, undone by a decision favorable to petitioners in this case. Without in any way prejudicing the matters decided in the second *Chenery* case, this Court can instruct the Commission to approve Federal's dissolution only upon terms that are fair and equitable to the petitioners as well as all other persons affected. Rectifying the injustice done petitioners will not even undo the remainder of the dissolution plan itself. The other parts of that plan have been carried out without objection, and to facilitate the plan petitioners waived their rights to obtain in kind what Federal's other stockholders received on distribution so long as they receive equivalent value.

Even if Federal's dissolution were to be viewed as involving the same issue that has twice been before this Court, previous decisions are not *res judicata,* but

merely the law of the case. This distinction is basic. It gives the Court undoubted power to act. Earlier this term in *U. S.* v. *United States Smelting Refining and Mining Company,* March 27, 1950, the Court made clear the distinction:

> "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. . . . And although the latter [res judicata] is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here."

It should not escape the Court's attention that with the basis of the second *Chenery* case so completely undermined, as it has been by the Commission in subsequent actions, the law of this case becomes the first *Chenery* decision. There this Court condemned the very result that the Commission here seeks to force upon the District Court. In all respects, therefore, this case cries out for the Court to exercise its discretion to force the Commission to apply the same rule of law to petitioners as it does to all other similarly situated claimants. If there is no rule of general application, such as this Court thought it was approving in the second *Chenery* decision, certainly petitioners should not now be held to such a rule. On the other hand, if the rule has been "amended" by the Commission's action in three subsequent cases, the petitioners should be judged by the amended rule, not by the unyielding rule which the Commission discovered against them originally.

Petitioners' claims against Federal are outstanding today. They have never been extinguished by any decision of this Court. If they are to be extinguished by payment of $313,190 or any other amount the extin-

guishment will be by virtue of an injunction issued by the District Court in this case upon the Commission's request. The District Court should not be compelled to such action by any previous decision of this Court so long as this plan is neither fair nor equitable within the meaning of § 11.

III

This petition is filed prior to rendition of judgment by the Court of Appeals because that Court cannot resolve the critical issue presented by petitioners' appeal. The District Court has made clear that it would remand the cause to the Commission were it not for this Court's second *Chenery* decision. Whether or not that decision defeats petitioners' claims is a matter that must be decided by this Court. An opinion from the Court of Appeals would merely delay this already lengthy litigation. The public interest will most certainly be promoted by prompt settlement of the matter in this Court.

Petitioners further suggest that it would be appropriate for the Court to remand the matter to the Commission without further hearing. The only question to be decided is whether the second *Chenery* decision in and of itself constitutes authority for the approval and enforcement of Federal's dissolution plan. The District Court has already found that otherwise the plan is unfair and inequitable. If petitioners prevail, the full measure of relief they can expect is for the cause to be remanded to the Commission for development of a new plan. Petitioners believe that briefing and argument would not materially assist the Court in resolving this question. And in view of the unusual length of time that has already been consumed in this litigation —over ten years—and the fact that further proceed-

ings must be had, at least before the Commission, even if petitioners prevail on this petition, it is believed especially appropriate for this Court to act on this petition and remand the cause to the Commission with instructions that the second *Chenery* decision does not determine the disposition of petitioners' claims against Federal.

CONCLUSION

Writ of certiorari should be granted. For the reasons stated above it would be appropriate for the Court to review and remand without further hearing.

Respectfully submitted,

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